SC94526

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

CHRISTOPHER C. CLAYCOMB,

Appellant.

Appeal from Clay County Circuit Court
43rd Judicial Circuit
The Honorable J. Bartley Spear, Jr., Judge

APPELLANT'S SUBSTITUTE BRIEF

DAMIEN DE LOYOLA # 64267
Assistant Appellate Defender
Office of the Public Defender
Western Appellate/PCR Division
920 Main Street, Suite 500
Kansas City, Missouri 64105

Tel: 816.889.7699
Fax: 816.889.2088
damien.deloyola@mspd.mo.gov

Counsel for Appellant

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JURISDICTIONAL STATEMENT

Appellant Christopher C. Claycomb appeals his conviction in *State v. Claycomb*, 06CN-CR00497-01, following a bench trial[1] in the Circuit Court of Clinton County in which he was found guilty of the crime of nonsupport as a D felony in violation of § 568.040[2] (LF 15-18; Sent. Tr. 3-4).[3] On January 10, 2013, the Honorable J. Bartley Spear, Jr., sentenced Mr. Claycomb to four years' incarceration, suspended the execution of sentence, and placed Mr. Claycomb on probation for a term of five years (LF 15-18; App'x A3-A6; Sent. Tr. 12). Mr. Claycomb timely filed his notice of appeal (LF 22-23).

The Court of Appeals, Western District, issued an order and supporting memorandum affirming Mr. Claycomb's conviction and sentence. This Court ordered

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[1] The Judgment erroneously states that Mr. Claycomb was "found guilty upon a plea of guilty" (LF 15).

[2] This case deals with a criminal nonsupport case filed in 2006 (LF 2-3). Accordingly, the case was prosecuted under § 568.040 as it existed in 2006 and all citations are to § 568.040 as it existed in 2006 (§ 568.040 was amended in 2009 and 2011). A copy of § 568.040 as it existed in 2006 is included in the Appendix filed with this brief on page A2. All other statutory citations are to Missouri Revised Statutes 2000, as updated through the present unless otherwise noted.

[3] The Record on Appeal consists of a Legal File ("LF"), Trial Transcript ("Trial Tr."), Sentencing Transcript ("Sent. Tr."), and Appendix ("App'x").

transfer on November 25, 2014, after Mr. Claycomb's application. Mo. Const., Art. V, § 9; Rule 83.04.

STATEMENT OF FACTS

On June 18, 2009, the State charged Christopher C. Claycomb by information with the D felony of criminal nonsupport, § 568.040 (LF 11). The Information alleged that Mr. Claycomb failed to provide "adequate food, clothing, lodging and adequate medical attention" for his son, T.C., and had not paid any child support for six individual months between August 1, 2005, and July 31, 2006 (LF 5).

The case proceeded to a bench trial on September 17, 2012, after numerous continuances by the defense to allow Mr. Claycomb to try and resolve his social security disability claim (LF 10; Sent. Tr. 15). At trial, the State presented one witness, Ms. Jacqueline Green (Trial Tr. 2). On direct, Ms. Green testified she was Mr. Claycomb's ex-wife, and they had a child together, T.C. (Trial Tr. 7). Per their 2004 divorce decree, Mr. Claycomb was to pay $247.00 per month in child support to Ms. Green (Trial Tr. 8). T.C. lived with Ms. Green during the twelve month period of August 1, 2005 to July 31, 2006 (Trial Tr. 8). Also during this period, Mr. Claycomb missed more than six months of his child support payments and did not make any direct monetary payments to Ms. Green "for any sort of food, clothing, or lodging for the minor child" (Trial Tr. 9). Ms. Green was also unaware of any physical or mental issues that would have prevented Mr. Claycomb from working during that period and providing support (Trial Tr. 9).

On cross-examination, Ms. Green testified that she did not see Mr. Claycomb on a regular basis from August 1, 2005, to July 31, 2006, but heard from T.C. that he was running a bar in Lathrop with his girlfriend (Trial Tr. 9-10). Ms. Green also testified that

T.C. was thirteen during the time period at issue and was getting ready to attend college in January (Trial Tr. 10).

The State performed no redirect with Ms. Green, and, with no objection, the State offered and the trial court admitted Mr. Claycomb's certified pay history into evidence (Trial Tr. 10; State's Exhibit A). The certified pay history showed that Mr. Claycomb was current on his child support from June 2005, to September 2005, stopped paying until September 2006, and then made a lump-sum payment of $2,964.00, which erased his arrearage from that period and made him current on his child support (State's Exhibit A).

The defense's case consisted of Mr. Claycomb's Veteran's Administration medical records (Defense Exhibit B) and Mr. Claycomb's testimony (Trial Tr. 11). Mr. Claycomb testified that the last time he was able to work was July 2007, due to medical problems, including that his "brain bled out," and he has a seizure disorder (Trial Tr. 12). Mr. Claycomb also testified that he currently has cancer (Trial Tr. 12). Going back to the time period of August 1, 2005, through July 13, 2006, Mr. Claycomb testified he thought he was working construction (Trial Tr. 13). Mr. Claycomb also testified that he thought he had paid his support in full up through July 2007 (Trial Tr. 13).

On cross-examination, Mr. Claycomb testified he was not suffering from his medical problems between August 2005 and July 2006 (Trial Tr. 13). During that time, his girlfriend owned a bar at which Mr. Claycomb worked but was not paid a wage (Trial Tr. 13-14). Although Mr. Claycomb became current with his child support in September 2006, he admitted that he got behind during 2005 and 2006 and missed some monthly

child support payments (Trial Tr. 14). Finally, Mr. Claycomb testified that he had been denied social security disability once but was in the process of starting a new application (Trial Tr. 14). The State and the defense each made brief closing arguments, and the court took the case under advisement (Trial Tr. 15-16).

On October 1, 2012, the trial court found Mr. Claycomb guilty of the class D felony of nonsupport (Sent. Tr. 3-4). Sentencing was held on January 10, 2013 (Sent. Tr. 6). The State requested Mr. Claycomb be placed on probation for five years (Sent. Tr. 8). The defense requested probation or a minimum amount of time in the county jail (Sent. Tr. 10). Following the State's suggestion, the court sentenced Mr. Claycomb to four years imprisonment, suspended execution of sentence, and placed Mr. Claycomb on probation for a term of five years (Sent. Tr. 12). The court then, sharply rebuked Mr. Claycomb twice and let him know that if he violated probation he would be sent to prison immediately (Sent. Tr. 13-15).

On January 18, 2013, Mr. Claycomb filed a notice of appeal (LF 22-23). The Court of Appeals, Western District issued an order and supporting memorandum affirming Mr. Claycomb's sentences and convictions (WD76062). This Court ordered transfer on November 25, 2014, after Mr. Claycomb's application. This appeal follows.

POINTS ON APPEAL

POINT I:

The trial court either erred or plainly erred in finding Mr. Claycomb guilty of criminal nonsupport for failure to provide support for his minor son, in violation of Mr. Claycomb's rights to due process and to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a), of the Missouri Constitution, because the State's evidence was insufficient to support a finding of guilt of criminal nonsupport, in that the State failed to present evidence that Mr. Claycomb did not provide adequate support to the minor child. Manifest injustice resulted, because Mr. Claycomb was found guilty of criminal nonsupport and there was insufficient evidence to sustain the conviction.

U.S. Const., Amends. V, VI, & XIV

Mo. Const. Art. I, §§ 10 & 18(a)

Mo. Rev. Stat. § 568.040

State v. Reed, 181 S.W.3d 567 (Mo. banc 2006)

State v. Withrow, 8 S.W.3d 75, 77 (Mo. banc 1999)

State v. Sharp, 341 S.W.3d 834 (Mo. App. W.D. 2011)

State v. Warren, 304 S.W.3d 796 (Mo. App. W.D. 2010)

POINT II:

The trial court erred or plainly erred in finding Mr. Claycomb guilty of criminal nonsupport for failure to provide support for his minor son, in violation of Mr. Claycomb's rights to due process and to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a), of the Missouri Constitution, because the State's evidence was insufficient to support a finding of guilt of criminal nonsupport, in that the State failed to present any evidence of what constituted "adequate support." Manifest injustice resulted, because Mr. Claycomb was found guilty of criminal nonsupport and there was insufficient evidence to sustain the conviction

U.S. Const., Amends. V, VI, & XIV

Mo. Const. Art. I, §§ 10 & 18(a)

Mo. Rev. Stat. § 568.040

State v. Reed, 181 S.W.3d 567 (Mo. banc 2006)

State v. Sharp, 341 S.W.3d 834 (Mo. App. W.D. 2011)

State v. Warren, 304 S.W.3d 796 (Mo. App. W.D. 2010)

State v. Watkins, 130 S.W.3d 598 (Mo. App. W.D. 2004)

ARGUMENT ON APPEAL

POINT I: ADEQUATE SUPPORT INCLUDES MORE THAN JUST MONEY

The trial court erred or plainly erred in finding Mr. Claycomb guilty of criminal nonsupport for failure to provide support for his minor son, in violation of Mr. Claycomb's rights to due process and to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a), of the Missouri Constitution, because the State's evidence was insufficient to support a finding of guilt of criminal nonsupport, in that the State failed to present evidence that Mr. Claycomb did not provide adequate support to the minor child. Manifest injustice resulted, because Mr. Claycomb was found guilty of criminal nonsupport and there was insufficient evidence to sustain the conviction

Preservation

This challenge to the sufficiency of the evidence is preserved for appellate review under Rules 27.07 and 29.11, should be considered preserved based on the nature of sufficiency claims and the rights implicated in criminal trials, should be considered preserved based on the nature of sufficiency claims and the issues present in criminal bench trials, or should be reviewed under plain error.

Preservation Under Rules 27.07 and 29.11

Mr. Claycomb's challenge to the sufficiency of the evidence is preserved on appeal. Rules 27.07 and 29.11 govern the filing of motions for acquittal and the

preservation of claims on appeal and neither requires a defendant to object to or file a motion for acquittal in order to preserve a claim challenging sufficiency of the evidence to sustain a conviction. Although typically both classified as sufficiency challenges, a claim of error challenging the denial of a motion for acquittal made after the close of the State's evidence or all evidence, under Rule 27.07(a), is distinct from a claim challenging the sufficiency of the evidence to sustain a conviction after a finding of guilt. *Compare State v. Lane*, 415 S.W.3d 740, 752 (Mo. App. S.D. 2013), and *State v. Jones*, 296 S.W.3d 506, 509 (Mo. App. E.D. 2009) (both concerning challenges to the denial of motions for acquittal after the presentation of all evidence), *with State v. Miller*, 372 S.W.3d 455, 463 (Mo. banc 2012), and *State v. Smith*, 353 S.W.3d 100, 109 (Mo. App. W.D. 2011) (both concerning challenges to the sufficiency of the evidence to sustain a conviction).

A defendant does not need to file a motion for acquittal after the State's or all evidence in order to file a motion for acquittal challenging the sufficiency of the evidence to sustain a conviction. Rule 27.07(c) ("It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury"). Furthermore, in neither a bench trial nor a jury trial is a defendant required to file a motion for acquittal challenging the sufficiency of the evidence to sustain a conviction in order to preserve that claim for appellate review. Rule 29.11(d)(3),(e)(2)(C) ("allegations of error to be preserved for appellate review must be included in a motion for new trial except for questions as to the following: . . . The sufficiency of the evidence

to sustain the conviction"). Accordingly, Mr. Claycomb's challenge to the sufficiency of the evidence to sustain his conviction is preserved on appeal.

Adopting a New Rule for Preservation of Sufficiency Claims in All Criminal Trials

Should this Court decline to find Mr. Claycomb's sufficiency claim preserved under Rules 27.07 and 29.11, Appellant respectfully requests that this Court adopt a rule finding all claims of sufficiency of the evidence to sustain a conviction as automatically preserved. Typically, when there is no objection to a claimed error during a bench trial, that error may only be reviewed under the plain error standard. *State v. Freeman*, 189 S.W.3d 605, 608 (Mo. App. W.D. 2006); Rule 30.20.[4] Defense counsel never objected to the sufficiency of the evidence during trial; accordingly, under existing Missouri law, a sufficiency claim may only be reviewed for plain error. *State v. Willis*, 97 S.W.3d 548, 556 (Mo. App. W.D. 2003).

This Court has previously distinguished unpreserved sufficiency claims from other unpreserved claims of error, finding that "[i]f the evidence is insufficient to sustain a conviction, plain error affecting substantial rights is involved from which manifest injustice must have resulted" *State v. Withrow*, 8 S.W.3d 75, 77 (Mo. banc 1999) (citing *State v. McClunie*, 438 S.W.2d 267, 268 (Mo. 1969)). Under *Withrow*, the State's failure to produce sufficient evidence to sustain a conviction always meets the plain error test.

In light of the Western District Court of Appeals deviation from this principle in this case, this Court should consider joining a growing number of states in abandoning

[4] All citations are to Missouri Supreme Court Rules unless otherwise noted.

the requirement of filing a motion for judgment of acquittal during trial. There are four policy considerations that inform the requirement that a party object to a claimed error in order to preserve a claim on appeal: 1) an appellate court should not convict a trial court of error when the issue was never presented for its determination, 2) a concern with judicial resources, 3) the potential for sandbagging, and 4) that the failure to object to an issue may have been trial strategy. None of these policies apply to claims challenging the sufficiency of the evidence.

First, Missouri courts have declined to review errors that were never raised before the trial court, because "[a]n appellate court will not convict a trial court of error on an issue which was not put before it to decide." *State v. Hitchcock*, 329 S.W.3d 741, 747 (Mo. App. S.D. 2011). This concern is not implicated with sufficiency claims. As observed by the Supreme Courts of Idaho and Montana, whose procedural rules allow for the trial court to *sua sponte* review the sufficiency of the evidence:

> The challenge to the sufficiency of the evidence is not based on a technical or subtle defect. The defense simply says that there was not enough admissible evidence to convict the defendant. Idaho Criminal Rule 29(a) provides that the trial court can address this issue on the motion of the defendant or upon its own motion prior to the submission of the case to the jury.

State v. Faught, 877, 908 P.2d 566, 570 (Idaho 1995).

> [A defendant's failure to file] a motion for acquittal does not deny a district court the opportunity to rule on the issue of sufficiency of the evidence.

> Under § 46-16-403, MCA, a district court may, "on its own motion . . . dismiss the action . . ." when the evidence is insufficient to support a finding or verdict of guilty.

State v. Granby, 939 P.2d 1006, 1009 (Mont. 1997). Because a conviction sustained on insufficient evidence implicates fundamental rights, and because a trial court can *sua sponte* review the sufficiency of the evidence, the Supreme Courts of Idaho and Montana abandoned any preservation requirement for sufficiency claims. Missouri Supreme Court Rule 27.07(a) is nearly identical to Idaho Criminal Rule 29(a) and allows for the same type of review as Montana Code § 46-13-403.[5] Accordingly, the trial court had an opportunity to rule on the sufficiency of the evidence.

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[5] *Compare* Missouri Supreme Court Rule 27.07(a):

> The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

with Idaho Criminal Rule 29(a):

> The court on motion of the defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, information or complaint after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

Second, and closely related, is the concern of preserving judicial resources by prohibiting a defendant from raising a claim on appeal that was not raised with the trial court. *See State v. Grist*, 275 P.3d 12, 19 (Idaho Ct. App. 2012) (quoting *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir.1991)). As discussed above, however, Rule 27.07 automatically puts the issue of sufficiency before the trial court so no judicial resources are wasted. In every case the trial court will have already determined that there was sufficient evidence or passed on making the ruling.

Third, Missouri courts have been wary to exercise plain error where it would allow a party to "'sandbag' a constitutional claim, gamble on a jury result, and, then if the verdict is adverse, claim plain error." *Philmon v. Baum*, 865 S.W.2d 771, 775 (Mo. App. W.D. 1993) (citing *Associated Underwriters, Inc. v. Mercantile Trust Co. Nat'l Ass'n*, 576 S.W.2d 343, 346 (Mo. App. 1978)). As observed by the Minnesota Court of Appeals, this concern is not present with a sufficiency claim. *State v. Clow*, 600 N.W.2d 724, 726 (Minn. Ct. App. 1999). A defendant's "not guilty plea by itself formally put the state to the burden of proving all elements of the offense beyond a reasonable doubt." *Id.* It can come as no surprise to the State then, that a defendant, having pleaded not guilty,

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and with Mont. Code § 46-13-403:

> When, at the close of the prosecution's evidence or at the close of all the evidence, the evidence is insufficient to support a finding or verdict of guilty, the court may, on its own motion or on the motion of the defendant, dismiss the action and discharge the defendant.

would challenge the sufficiency of the evidence. *Id.* Accordingly, a concern with potential sandbagging is not present when a defendant fails to file motions for acquittal.

Fourth, Missouri courts have declined to engage in plain error review of claims where it appears that the failure to object "is more likely a function of trial strategy than of error, [because] any intervention by the circuit court would have been uninvited and may have caused increased error." *State v. Tisius*, 362 S.W.3d 398, 409 (Mo. banc 2012) (citations and quotation marks omitted). However, "Plain error review would apply when no objection is made due to 'inadvertence or negligence.'" *State v. Johnson*, 284 S.W.3d 561, 582 (Mo. banc 2009) (quoting *State v. Mead*, 105 S.W.3d 552, 556 (Mo. App. W.D. 2003)). Indeed, where a "party merely fails to object because of inadvertence or negligence, plain error review should be, and is, available." *Mead*, 105 S.W.3d at 556. Thus, the concern that the failure to object is part of a trial strategy is not present with sufficiency claims. A sufficiency claim challenges the ultimate issue in the case – whether the State met its burden to produce sufficient evidence to prove all elements of the offense beyond a reasonable doubt. Aside from "inadvertence or negligence," there is no reason why a defendant would fail to file a motion for acquittal.

While none of the reasons that would typically support an appellate court's refusal to engage in plain error review are present with sufficiency claims, there are substantial policy and legal reasons supporting the review of sufficiency claims where no motion for acquittal was filed. There is "no greater injustice can be done the defendant, nor could he be more humiliated, or a greater calamity befall him, than to be convicted of this offense if in fact he was not guilty." *State v. Riseling*, 186 Mo. 521, 85 S.W. 372, 375 (Mo.

1905). In *State v. Jackson*, 433 S.W.3d 390, 406 (Mo. banc 2014), and *State v. Pierce*, 433 S.W.3d 424, 433 (Mo. banc 2014), this Court refused to narrow, and strongly reaffirmed, its commitment to the "basic principle that entering a plea of 'not guilty' is all that a defendant needs to do to put the government to its proof on every element of the crime." *Jackson*, 433 S.W.3d at 406 (citing *State v. Moore*, 435 S.W.2d 8, 11–12 (Mo. banc 1968)); *see also State v. Self*, 155 S.W.3d 756, 762 (Mo. banc 2005) ("it is always the State's burden to establish a factual basis for elements of the crime charged"). The fundamental principle that it is the State's burden to prove every element is precisely what is at issue when an appellate court reviews the sufficiency of the evidence. *See Garza v. State*, 670 S.E.2d 73, 79 n.7 (Ga. 2008) ("Because due process requires the existence of sufficient evidence as to every element of the crime of which a defendant is convicted . . . the fact that this issue was not explicitly raised does not prevent us from addressing (nor, more importantly, does it justify a refusal to address) the issue at this juncture" (citing *Jackson v. Virginia*, 443 U.S. 307 (1979))).

As discussed *supra*, Rules 27.07 and 29.11 favor the review of the sufficiency of the evidence. Additionally, the mutual understanding principle, adopted by this Court in *State v. Baker*, 103 S.W.3d 711, 717 (Mo. banc 2003), holds that although a party may appear to waive a prior continuing objection by stating "no objection" to the admission of some evidence, if "it was mutually understood that appellant did not intend to repudiate his prior objection, this Court will likewise acknowledge its continued validity." "'[A] simple plea of not guilty . . . puts the prosecution to its proof as to all elements of the crime charged.'" *Estelle v. McGuire*, 502 U.S. 62, 69 (1991) (quoting *Mathews v. United*

States, 485 U.S. 58, 64–65 (1988)). A plea of not guilty and the subsequent trial function as a continuing objection to the State's position that the defendant is guilty. So long as a defendant persists with a plea of not guilty and absent a formal stipulation, both the State and the trial court must understand that the defendant has not waived his or her objection to lack of the State's evidence. Accordingly, the very fact that a defendant takes a case to trial can be seen under the mutual understanding principle to preserve a challenge to the sufficiency of the evidence.

Faced with these same considerations, the Wyoming Supreme Court in *Garay v. State*, 165 P.3d 99, 101 n.1 (Wyo. 2007), abandoned plain error review for sufficiency claims and considered all sufficiency claims preserved. The driving forces behind this change were the Court's recognitions that 1) although it discussed the sufficiency claims as plain error, the actual analysis did not change; 2) sufficiency claims did not fit well within plain error analysis; 3) a fundamental right is always at stake; and 4) "'a defendant is always prejudiced if he is found guilty and the evidence is not sufficient to establish his guilt.'" *Pena v. State*, 294 P.3d 13, 18 n.2 (Wyo. 2013) (quoting *Garay*, 165 P.3d 99).

Given this Court's recognition in *Withrow*, 8 S.W.3d at 77, that plain error always results when the State fails to produce sufficient evidence to sustain a conviction and that the same standard is applied in preserved and unpreserved sufficiency claims, like the Supreme Courts of Idaho, Montana, and Wyoming, this Court should remove the label of plain error from sufficiency claims where no objection was raised and always consider them preserved.

Adopting a New Rule for Preservation of Sufficiency Claims in Criminal Bench Trials

Should this Court decline to adopt a new rule for the preservation of sufficiency claims in all criminal trials, this Court should adopt the Iowa Supreme Court's reasoning in *State v. Abbas*, 561 N.W.2d 72, 74 (Iowa 1997), where it eliminated the requirement that a defendant file motions for acquittal during a criminal bench trial. The Court reasoned that "[t]he purpose of . . . a [motion for judgment of acquittal in a jury trial] is to provide the court with an opportunity to ensure that there is sufficient evidence to support the submission of the case to the jury which serves as the fact finder. In a bench trial, the court is the fact finder and its finding of guilt necessarily includes a finding that the evidence was sufficient to sustain a conviction." This Court should adopt this simple but forceful logic with respect to the preservation of sufficiency claims in bench trials and consider the sufficiency claim raised below as preserved.

Plain Error Review

Should this Court decline to adopt any of Appellant's three theories of preservation above and conclude that Mr. Claycomb's sufficiency claim is not preserved, Appellant requests this Court engage in plain error review of Mr. Claycomb's sufficiency claim. Rule 30.20. Plain error review involves a two-step process: (1) this Court determines whether "the claimed error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted[;]" and (2) this Court, at its discretion, "consider[s] whether or not a miscarriage of justice or manifest injustice will occur if the error is left uncorrected." *State v. Mullins*, 140 S.W.3d 64, 68 (Mo. App. W.D. 2004) (internal citations and quotation marks omitted).

As this Court held in *Withrow*, 8 S.W.3d at 77, "[i]f the evidence is insufficient to sustain a conviction, plain error affecting substantial rights is involved from which manifest injustice must have resulted" (citing *McClunie*, 438 S.W.2d at 268). Because the State's failure to produce sufficient evidence to sustain a conviction always results in manifest injustice, plain error review is always appropriate.[6]

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[6] The Western District Court of Appeals declined to engage in plain error review based on its finding that "defense counsel's statements . . . would have suggested to both the court and the prosecution that Claycomb's failure to provide adequate support to his child was uncontested," and it did not matter whether the "statements amounted to a formal stipulation" (Memo. 9). This finding is in direct contravention of the United States Supreme Court's holding in *Estelle v. McGuire*, 502 U.S. 62 (1991), that:

> [T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense. In the federal courts, '[a] simple plea of not guilty . . . puts the prosecution to its proof as to all elements of the crime charged.' Neither the Court of Appeals nor the parties have given us any reason to think that the rule is different in California.

Id. at 69-70 (quoting *Mathews v. United States*, 485 U.S. 58, 64–65 (1988)).

Furthermore, the notion that it does not matter whether the statements were a formal stipulation is in direct contravention of the judicial admission doctrine which requires a clear an unqualified stipulation by an opponent to relieve a party of its burden

Standard of Review

Whether preserved or unpreserved, the standard for reviewing a claim of sufficiency of the evidence remains the same, this Court's "role is limited to determining whether sufficient evidence exists from which a reasonable trier of fact might have found the defendant guilty beyond a reasonable doubt." *Warren*, 304 S.W.3d at 799-800. The evidence and all reasonable inferences are viewed in the light most favorable to the verdict, and all contrary evidence and inferences are disregarded. *Id.* at 800. Deference also is given "to the circuit court's decision as to the credibility and weight of the witnesses' testimony, and . . . [with the recognition] that the circuit court 'may believe all, some, or none of the testimony of a witness.'" *Id.* (quoting *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. banc 2002)). This Court, however, "'may not supply missing evidence, or give the [State] the benefit of unreasonable, speculative or forced inferences.'" *State v. Loyd*, 326 S.W.3d 908, 916 (Mo. App. W.D. 2010) (quoting *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001)) (alteration in original).

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on an element. *Goudeaux v. Bd. of Police Com'rs of Kansas City*, 409 S.W.3d 508, 519 (Mo. App. W.D. 2013) (citing *Chilton v. Gorden*, 952 S.W.2d 773, 777 (Mo. App. S.D. 1997)). Here, defense counsel's statement that "I don't know that there's a whole lot of contesting that he hasn't paid" cannot be read as an unequivocal, clear, and unqualified admission that Mr. Claycomb provided no in-kind support as it only concerns the payment of child support (Trial Tr. 5).

Discussion

A conviction based on insufficient evidence violates a defendant's rights to due process and a fair trial, under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a), of the Missouri Constitution. *State v. Redifer*, 215 S.W.3d 725, 730 (Mo. App. W.D. 2006).

A parent commits the crime of nonsupport if he or she (1) "knowingly fails to provide," (2) "without good cause," (3) "adequate support" (4) "which such parent is legally obligated to provide for his child." *State v. Link*, 167 S.W.3d 763, 766 (Mo. App. W.D. 2005) (quoting § 568.040.1).

The crime of nonsupport is premised on the notion that "[e]very parent has a legal obligation to provide for his or her children . . . ." *State v. Reed*, 181 S.W.3d 567, 570 (Mo. banc 2006). Irrespective of the existence of a support order or even knowledge of a support order, so long as a person knows they have a child, they must provide support for that child. *State v. Orando*, 284 S.W.3d 188, 191 (Mo. App. E.D. 2009). "The purpose of the criminal nonsupport statute is to compel recalcitrant parents to fulfill their obligations of care and support; the purpose is not to enforce court-ordered child support obligations." *Reed*, 181 S.W.3d at 570. "That a parent is not paying what the circuit court ordered him to pay in a dissolution decree, while relevant, does not establish conclusively a criminal violation under § 568.040." *State v. Watkins*, 130 S.W.3d 598, 600 (Mo. App. W.D. 2004) (citing *State v. Morovitz*, 867 S.W.2d 506, 508 (Mo. banc 1993)).

The State approached the case from the position that Mr. Claycomb did not pay court-ordered child support in ten of the twelve months from August 1, 2005, to July 31, 2006, and, thus, he was guilty of criminal nonsupport (Trial Tr. 8-9; State's Exhibit A) In equating criminal nonsupport with the failure to pay under a support order, the State ignored that "support," under § 568.040, does not require a parent to provide money for the child.

Section 568.040.1 requires a parent to provide "adequate support." As specifically defined in the statute, "'Support' means food, clothing, lodging, and medical or surgical attention." § 568.040.2(3). Accordingly, to provide "adequate support" a parent need not pay money to the child, the other parent, or into the child support system. If a parent was a farmer and provided adequate food directly from the farm to the child, that parent would not be guilty of nonsupport based on a failure to provide food. If a parent bought adequate clothing for a child but did not give that child or the other parent money to buy clothes for the child, that parent would not be guilty of nonsupport based on a failure to provide clothing. If a parent owned an adequate second house and allowed the child and the other parent to live in it for no rent, that parent would not be guilty of nonsupport based on a failure to provide lodging. If a parent worked in a trade and bartered those services with a doctor for adequate medical attention for the child, that parent would not be guilty of nonsupport based on a failure to provide medical or surgical attention.

It is the State's burden to prove each and every element of a criminal offense. *State v. Sharp*, 341 S.W.3d 834, 842 (Mo. App. W.D. 2011). This does not mean that the State has "an affirmative duty to disprove every reasonable hypothesis except that of

guilt." *State v. Chaney*, 967 S.W.2d 47, 54 (Mo. banc 1998). These alternative-forms-of-support hypotheticals are not offered to suggest that the State has a burden of disproof in nonsupport cases but, instead, merely to point out that, under § 568.040, support is not limited direct monetary support. Accordingly, a failure to provide direct monetary support does not establish criminal liability under the nonsupport statute; the state must prove a lack of support as defined by § 568.040.

Here, the state proved that:

1. There was child support order requiring Mr. Claycomb to pay $247.00 a month in child support (Trial Tr. 8);
2. From August 1, 2005 to July 31, 2006, Mr. Claycomb paid child support only in August and September of 2005 (Trial Tr. 9; State's Exhibit A); and
3. From August 1, 2005 to July 31, 2006, Mr. Claycomb did not make any direct monetary payments to Ms. Green for food, clothing, or lodging for the minor child (Trial Tr. 9).

Taken together, what the State proved was that Mr. Claycomb did not pay ten months of child support and did not make direct monetary payments to Ms. Green for the support of their child from August 1, 2005 to July 31, 2006. What the State did not prove was that Mr. Claycomb provided inadequate support. The State never established that Mr. Claycomb did not provide support for T.C.; the State only established that Mr. Claycomb did not pay his child support and did not pay Ms. Green directly. This proof is, as a matter of law, insufficient to support a conviction for nonsupport.

To prove criminal nonsupport in this case, the State would not need to explore every possible reasonable means of providing support aside from direct financial support. All the State would have had to ask Ms. Green was, "Aside from monetary payments, did Mr. Claycomb provide any type of support for T.C. between August 1, 2005, and August 6, 2006?" Assuming, without admitting, that Ms. Green's answer would be "no, Mr. Claycomb provided no other type of support for T.C. between August 1, 2005, and August 6, 2006," then the State would have produced sufficient evidence for a fact finder to find Mr. Claycomb guilty of criminal nonsupport. One question is all it would have taken. The State did not ask it, which means the State did not provide sufficient evidence to support a finding that Mr. Claycomb was guilty of criminal nonsupport.

Because the State failed to establish that Mr. Claycomb failed to provide "adequate support," the evidence is insufficient to sustain Mr. Claycomb's conviction for criminal nonsupport, and this Court must reverse and remand Mr. Claycomb's case with instructions to vacate his conviction and sentence.

POINT II: WHAT CONSTITUTED ADEQUATE SUPPORT

The trial court erred or plainly erred in finding Mr. Claycomb guilty of criminal nonsupport for failure to provide support for his minor son, in violation of Mr. Claycomb's rights to due process and to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a), of the Missouri Constitution, because the State's evidence was insufficient to support a finding of guilt of criminal nonsupport, in that the State failed to present any evidence of what constituted "adequate support." Manifest injustice resulted, because Mr. Claycomb was found guilty of criminal nonsupport and there was insufficient evidence to sustain the conviction

This Point is raised in the alternative to Point I and assumes that this Court denied relief in Point I. This Point should not be read as an admission that money is the sole means through which a parent can provide support under § 568.040.

Preservation

This Court should consider this claim preserved under one of the theories presented in the preservation section in Point I. Alternatively, this Court should review this claim under plain error.

Plain error review involves a two-step process: (1) this Court determines whether "the claimed error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted[;]" and (2) this Court, at its discretion, "consider[s] whether or not a miscarriage of justice or manifest injustice will occur if the

error is left uncorrected." *Mullins*, 140 S.W.3d at 68 (internal citations and quotation marks omitted).

Plain error review is appropriate to a review challenging the sufficiency of the evidence. *Warren*, 304 S.W.3d at 799. "If the evidence is insufficient to sustain a conviction, plain error affecting substantial rights is involved from which manifest injustice must have resulted." *Id.* (quoting *Withrow*, 8 S.W.3d at 77).

Standard of Review

Whether preserved or unpreserved, the standard for reviewing a claim of sufficiency of the evidence remains the same, this Court's "role is limited to determining whether sufficient evidence exists from which a reasonable trier of fact might have found the defendant guilty beyond a reasonable doubt." *Warren*, 304 S.W.3d at 799-800. The evidence and all reasonable inferences are viewed in the light most favorable to the verdict and all contrary evidence and inferences are disregarded. *Id.* at 800. Deference also is given "to the circuit court's decision as to the credibility and weight of the witnesses' testimony, and . . . [with the recognition] that the circuit court 'may believe all, some, or none of the testimony of a witness.'" *Id.* (quoting *Crawford*, 68 S.W.3d at 408). This Court, however, "'may not supply missing evidence, or give the [State] the benefit of unreasonable, speculative or forced inferences.'" *Loyd*, 326 S.W.3d at 916 (quoting *Whalen*, 49 S.W.3d at 184 (alteration in original).

Discussion

A conviction based on insufficient evidence violates a defendant's rights to due process and a fair trial, under the Fifth, Sixth, and Fourteenth Amendments to the United

States Constitution and Article I, Sections 10 and 18(a), of the Missouri Constitution. *Redifer*, 215 S.W.3d at 730.

A parent commits the crime of nonsupport if he or she (1) "knowingly fails to provide," (2) "without good cause," (3) "adequate support" (4) "which such parent is legally obligated to provide for his child." *Link*, 167 S.W.3d at 766 (quoting § 568.040.1).

The crime of nonsupport is premised on the notion that "[e]very parent has a legal obligation to provide for his or her children . . . ." *Reed*, 181 S.W.3d 567, 570. Irrespective of the existence of a support order or even knowledge of a support order, so long as a person knows they have a child, they must provide support for that child. *Orando*, 284 S.W.3d at 191. "The purpose of the criminal nonsupport statute is to compel recalcitrant parents to fulfill their obligations of care and support; the purpose is not to enforce court-ordered child support obligations." *Reed*, 181 S.W.3d at 570. "That a parent is not paying what the circuit court ordered him to pay in a dissolution decree, while relevant, does not establish conclusively a criminal violation under § 568.040." *Watkins*, 130 S.W.3d at 600 (citing *Morovitz*, 867 S.W.2d at 508).

As defined in § 568.040.2(3), "'support' means food, clothing, lodging, and medical or surgical attention[.]" The "adequacy" of the support provided is a question of fact. *Watkins*, 130 S.W.3d at 600. To determine whether a parent is providing adequate support, the question to be asked "is whether or not a parent's monetary contribution as a whole would be sufficient were it first spent on the food, clothing, lodging, and medical care that he is obligated to provide." *Id.* at 601. To answer this question, a finder of fact

must necessarily be presented with some evidence of the amount of money necessary to meet the expenses of the child's basic needs of food, clothing, lodging, and medical or surgical attention. *Id.* at 601.

Watkins, 130 S.W.3d 598, provides the most instructive set of facts to demonstrate the distinction between a failure to comply with a support order and the inquiry necessary to determine what constitutes adequate support in a nonsupport prosecution. In 1995, per a divorce decree, Mr. Watkins was ordered to pay $928.00 per month in support for two of his children. *Id.* at 599. Over the next seven years, Mr. Watkins paid an average $536.00 per month. *Id.* Mr. Watkins was charged with criminal nonsupport, and by the time of trial, he owed a child support arrearage of $34,000.00. At trial, the State relied on Mr. Watkins' failure to abide by the support order but never introduced evidence of the expenses incurred for the children's food, clothing, lodging, and medical or surgical attention. *Id.* at 600-01. Because the State never established what constituted adequate support, the Court found the evidence was insufficient to support a conviction of nonsupport, because there was no way to determine whether the $536.00 paid by Mr. Watkins every month was adequate support. *Id.* at 601-02.

One could just as easily imagine the exact opposite scenario being true, where a parent always pays their full amount of child support but nevertheless is guilty of criminal nonsupport. A parent could be guilty of nonsupport where the sole support provided is a nominal child support payment under an unmodified child support order where the other parent and the child are living in abject poverty. Alternatively, a parent would not be guilty of nonsupport if that parent made an adequate cash lump-sum

payment at the beginning of every year with the understanding that that money was for the support of the child for the entire year. While that parent would not have paid child support for that year, that parent would not be guilty of criminal nonsupport. Examples are myriad where a failure to comply with a child support order would not establish criminal nonsupport and where compliance with a child support order would not be a bar to establish criminal nonsupport. The point is that the State must establish what adequate support would have been before it can establish that a defendant did not provide adequate support. *Watkins*, 130 S.W.3d at 601.

With this distinction between paying under a child support order and criminal nonsupport established, it becomes evident that the State did not present sufficient evidence that Mr. Claycomb failed to provide adequate support to T.C. Here, the state proved that:

1. There was child support order requiring Mr. Claycomb to pay $247.00 a month in child support (Trial Tr. 8);
2. From August 1, 2005 to July 31, 2006, Mr. Claycomb paid child support only in August and September of 2005 (Trial Tr. 9; State's Exhibit A); and
3. From August 1, 2005 to July 31, 2006, Mr. Claycomb did not make any direct monetary payments to Ms. Green for food, clothing, or lodging for the minor child (Trial Tr. 9).

What the state never proved, however, was what would have been adequate support for that period.

If for instance, as in *Watkins*, 130 S.W.3d 598, the amount of child support Mr. Claycomb was ordered to pay was double what was needed to provide adequate support for T.C., then the fact that Mr. Claycomb paid no money to support T.C. between August 1, 2005, and July 31, 2006, does not require that Mr. Claycomb is guilty of nonsupport. This is no different than a parent who makes a direct lump-sum payment at the beginning of the year. Certainly it violates the child support order but does not make a person guilty of criminal nonsupport without a showing of what adequate support of the minor child was.

This not to suggest that State needs to present an itemized accounting with receipts for every single food, clothing, lodging, and medical expense for the minor child, but the State does need to ask some questions on the issue. The State could have established their case by asking Ms. Green eight to-the-point questions, assuming Ms. Green's answers supported Mr. Claycomb's guilt:

1. Did T.C. have food expenses between August 1, 2005 to July 31, 2006?
2. What were those food expenses?
3. Did T.C. have clothing expenses between August 1, 2005 to July 31, 2006?
4. What were those clothing expenses?
5. Did T.C. have lodging expenses between August 1, 2005 to July 31, 2006?
6. What were those lodging expenses?
7. Did T.C. have medical expenses between August 1, 2005 to July 31, 2006?
8. What were those medical expenses?

This is all that was needed, the State did not do it, and, as the record stands, there is insufficient evidence to prove that Mr. Claycomb provided inadequate support for T.C., because there is no evidence of what adequate support was.

What the State proved in this case is that if Mr. Claycomb were guilty of criminal nonsupport, he would be guilty of a class D felony and not a class A misdemeanor. § 568.040.4. What the State failed to prove, however, is that Mr. Claycomb was guilty of criminal nonsupport. Because the State failed to establish what would constitute adequate support, the evidence is insufficient to sustain Mr. Claycomb's conviction for criminal nonsupport, and this Court must reverse and remand Mr. Claycomb's case with instructions to vacate his conviction and sentence.

CONCLUSION

Based on the argument presented, Mr. Claycomb respectfully requests this Court reverse the judgment of the trial court and vacate and set aside the judgment and sentences in the underlying criminal action, *State v. Claycomb*, 06CN-CR00497-01, and discharge Mr. Claycomb.

Respectfully submitted,

/s/ Damien de Loyola
DAMIEN DE LOYOLA #64267
Assistant Appellate Defender
Office of the Public Defender – Area 69
Western Appellate Division
920 Main, Suite 500
Kansas City, MO 64105
Tel: 816/889-7699
Fax: 816/889-2001
Damien.deLoyola@mspd.mo.gov

Counsel for Appellant

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Damien de Loyola, hereby certify as follows:

The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Office Word 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, this brief contains **8,307** words, which does not exceed the 31,000 words allowed for an appellant's brief under Rule 84.04.

A true and correct copy of the attached *Appellant's Substitute Brief* was sent through the e-filing system on December 15, 2014, to: Shaun J. Mackelprang, Chief Counsel, Criminal Appeals Division, Office of the Attorney General, at shaun.mackelprang@ago.mo.gov.

/s/ Damien de Loyola
Damien de Loyola